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IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1765.

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL and AMERICANS FOR SEPARATION OF CHURCH AND STATE,

Appellants,

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, et al.,

Intervening Parties Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLANTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-269.

SYLVIA MEEK, ET AL.,
Appellants,

v.

JOHN C. PITTENGER, ET AL.,
Appellees,

and

JOSE DIAZ, ET AL.,
Intervening Parties Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLANTS.

OPINIONS BELOW.

The majority and dissenting opinions of the District Court are reported at 374 F. Supp. 639. Copies of the opinions are set forth as appendices to the Jurisdictional Statement herein, and page reference to them in this brief will be preceded by the letters JS.

JURISDICTION.

The decision of the District Court and its Final Order were entered on March 7, 1974. A notice of appeal was filed on March 20, 1974. Probable jurisdiction was noted on October 15, 1974.

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1253. *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Committee for Public Education and Religion Liberty v. Nyquist*, 413 U. S. 756 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The First Amendment to the United States Constitutional provides in part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *.

Acts 194 and 195 are set forth as appendices to the Jurisdictional Statement and page references thereto will be preceded by the letters JS.[1]

1. Also challenged in the present suit was Act 204, which amended the State's "tuition reimbursement law" by increasing from 5 to 10% of the Cigarette Tax revenue the amount to be appropriated for payment of the tuition reimbursements. Act 204 was signed into law after the District Court declared the statute unconstitutional. This Court's affirmance of the District Court's decision, *Sloan v. Lemon*, 413 U. S. 825 (1973), rendered that part of the complaint herein moot.

QUESTIONS PRESENTED.

1. Does Act 194, which authorizes the expenditure of Commonwealth funds to provide auxiliary services in religious elementary and secondary schools, violate the Establishment Clause of the First Amendment to the United States Constitution?

2. Does Act 195 violate the Establishment Clause of the First Amendment insofar as it authorizes the use of Commonwealth funds to purchase, for use in religious elementary and secondary schools, (a) textbooks, (b) instructional materials, and (c) instruction equipment which "from its nature cannot be readily diverted to religious purposes"?

STATEMENT OF THE CASE.

The statutes challenged in this suit are the most recent in a series of laws enacted by the Pennsylvania Legislature in a continuing effort to provide tax-raised funds for the support of religious and private schools. Paragraph 8 of the complaint herein alleges and the appellees concede that included as eligible under the Acts are schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty apponitments, and (10) impose religious restrictions on what the faculty may teach.

Act 194 deals with auxiliary services which are defined (in section 1(b)) as:

> . . . guidance, counseling and testing services; psychological services, services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

Textbooks are provided for in Act 195 and are defined, in section 1(b):

> "Textbooks" means books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth.

Instructional materials and instructional equipment are also provided for in Act 195. The former are defined as follows:

> "Instructional materials" means books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes and video tapes, or any other printed and published materials of a similar nature made by any method now developed or hereafter to be developed. The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

Instructional equipment is defined as follows:

> "Instructional equipment" means instructional equipment, other than fixtures annexed to and forming part of the real estate, which is suitable for and to be used by children and/or tecahers. The term includes but is not limited to projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment as

may be of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

A three-judge court was duly convened and the plaintiffs moved for a preliminary injunction. At the hearing on the motion, held on September 10, 1973, the court directed that the trial of the action on the merits be advanced and consolidated with the hearing on the motion.

On March 7, 1974, the court handed down its decision as follows:

1. A majority of the court (Circuit Judge Gibson and District Judge Bechtle) upheld the constitutionality of Act 194. District Judge Higginbotham dissented.

2. With Judge Higginbotham's extremely reluctant concurrence, the court unanimously upheld the textbook provision of Act 195.

3. With Judge Higginbotham dissenting, the court upheld the instructional materials provision of Act 195.

4. With Judge Higginbotham dissenting, the court upheld the constitutionality of so much of Act 195 as authorized the expenditure of Commonwealth funds for religious school use of instructional equipment which "from its nature cannot be readily diverted to religious purposes, and is particularly designed or designated for . . . secular educational purposes provided for in . . . [the] statute and its duly-promulgated guides for the administration of such statute."

5. The court unanimously held unconstitutional so much of Act 195 as authorized expenditure of Commonwealth funds for religious school use of other instructional equipment. The court's order enjoined the defendants

from expending Commonwealth funds for the loaning of such instructional equipment and directed them to file amended guidelines describing the types of permissible equipment they intended to provide for nonpublic schools. (A copy of the guidelines is set forth herein as Appendix A, *infra*, pp. 33-34.)

SUMMARY OF ARGUMENT.

Acts 194, 195 and 204 manifest a legislative approach that views the Establishment Clause as a necessary evil—necessary because there is no practical way of removing it from the Constitution, but an evil nevertheless and therefore to be evaded or avoided to whatever extent possible. This was not the attitude of the generation that wrote the Clause into the Constitution; to them it reflected salutary democratic polity, and they expected that future generations would honor it in spirit as well as letter. Certainly it does not conform with the approach of this Court to the Clause, an approach concretized by the fact that after *Board of Education v. Allen,* 392 U. S. 236 (1963), the Court has repulsed every effort to evade or weaken the Clause through appropriation of public funds to finance the operation of church schools on the elementary and secondary level.

Act 194, providing for auxiliary educational services, cannot be reconciled with the decisions of this Court, particularly, *Lemon v. Kurtzman* and *Earley v. DiCenso,* 403 U. S. 602 (1971). The purpose and effect of the statute, just as of the earlier Pennsylvania law and the Rhode Island law, is to finance the teaching of secular subjects in church schools. *Lemon* and *DiCenso* held that this cannot be done under the Establishment Clause, either because it advances religion or because it entails forbidden state entanglement in religious operations, or both.

Act 195, providing for textbooks, was upheld by the District Court on the authority of *Allen. Allen,* however, was inconsistent with the interpretation of the Establishment Clause in the Court's pre-*Allen* decisions, and certainly is inconsistent with the language and spirit of the Court's many post-*Allen* decisions. The time may well

have come for the Court to re-examine *Allen* in the light of these decisions. But even if the Court should not do so, justification of Act 195 would require not merely following *Allen* but extending it, and this the Court has refused to do and cannot consistently with its many other decisions do.

The instructional materials provisions of Act 195 clearly go beyond the verge of *Allen* and the New York statute it upheld. The principles of advancement of religion, administrative entanglement and religious divisiveness are all applicable to these provisions of the Act.

Even the District Court recognized that the instructional equipment provisions went beyond the verge of *Allen,* no matter how liberally that decision is interpreted. It sought to cure the defect by limiting the statute to equipment which "from its nature cannot readily be diverted to religious purposes, and is particularly designed or designated for such secular purposes as provided for in said statute and its duly promulgated guidelines for the administration of such statute." This effort, we submit, is ineffectual; the statute is fatally defective on its face and is not subject to salvation by judicial interpretation or limitation.

ARGUMENT.

I.

The Establishment Clause: Friend or Foe?

We have noted that Acts 194, 195 and 204 followed invalidation of earlier efforts to divert tax-raised funds for the support of parochial and private schools. This pattern of searching for an acceptable variation of the same theme has been followed in a number of other states, notably New York and Ohio. The common motivating attitude is the same: the Establishment Clause is a necessary evil. It is necessary because it is quite obvious that the American people are not prepared to excise it from the Constitution. More than a decade has passed since the Court outlawed state-sponsored prayer and Bible reading in the public schools in *Engel v. Vitale,* 307 U. S. 421 (1962); *Abington School District v. Schempp,* 374 U. S. 203 (1963). During this period, there have been several determined efforts to overrule these decisions by constitutional amendment; all have failed. The chances of amending the Constitution to overrule the aid to parochial school decisions are even smaller; so small as to be negligible, as evidenced by the fact that unlike the prayer and Bible situation there does not appear to have been, at least until the present time, any serious effort to amend the Constitution to overrule these decisions.

Nevertheless, in these states the legislatures deem the Establishment Clause a foe, to be evaded and outwitted by whatever strategem may prove effective. If purchase of services won't work (*Lemon v. Kurtzman, supra*) try tuition reimbursement. If that won't work (*Sloan v. Lemon, supra*) try auxiliary services. If that won't work, go back to the drawing boards and come up with something else.

The generation that wrote the Establishment Clause into the Constitution did not view it as an enemy of the people. On the contrary, they deemed it the surest and most effective protector of religious freedom, and expected that its spirit as well as its letter would be honored by future generations. Above all, they intended to bar just the type of legislation involved in the present litigation. As concluded by the noted historian, Professor Leonard Levy, in his study, "No Establishment of Religion: The Original Understanding":

> * * * An establishment of religion in America at the time of the framing of the Bill of Rights meant government aid and sponsorship of religion, principally by impartial tax support of the institutions of religion, the churches.[2]

With the exception of *Allen,* to which we will address ourselves later, the decisions of this Court, at least as far as elementary and secondary schools are concerned, manifest a consistent adherence to the intent of the framers of the Clause. Every legislative effort to channel tax-raised funds to church schools, directly or indirectly, was repulsed and held violative of the Establishment Clause.

In *Lemon v. Kurtzman, supra,* the Court invalidated a purchase-of-services statute financed out of the proceeds of horseracing.

In *Sanders v. Johnson,* 403 U. S. 955 (1971), it affirmed without opinion a district court decision (319 F. Supp. 421) holding unconstitutional a purchase-of-services statute financed out of the general treasury.

In *Earley v. DiCenso, supra,* it held unconstitutional a salary supplement law.

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2. L. W. Levy, Judgments: Essays on American Constitutional History, p. 202 (1972).

In *Committee for Public Education and Religious Liberty v. Nyquist, supra,* it ruled invalid a statute providing tuition payments for low-income families.

In *Sloan v. Lemon, supra,* it invalidated a tuition reimbursement law.

In *Essex v. Wolman,* 409 U. S. 808 (1973), it affirmed without opinion a district court decision (342 F. Supp. 399) ruling unconstitutional a general tuition grants law.

In *Nyquist,* it struck down a law providing tax benefits for parents whose children attend parochial schools.

In *Grit v. Wolman,* — U. S. —, 93 S. Ct. 3062 (1973), it affirmed without opinion a District Court decision (353 F. Supp. 744) invalidating a law providing tax credits for such parents.

In *Nyquist,* it held unconstitutional statutory maintenance and repair grants to parochial schools.

In *Levitt v. Committee for Public Education and Religious Liberty,* 413 U. S. 472 (1973), it nullified statutory grants to pay for law-mandated services performed in parochial schools.

In *Donahey v. Protestants and Other Americans United for Separation of Church and State,* 403 U. S. 955 (1971), it denied a petition for certiorari to review a Court of Appeals decision, *Protestants and Other Americans United for Separation of Church and State v. United States,* 435 F. 2d 627 (1971), holding that, notwithstanding *Allen,* a substantial Federal question requiring the convening of a three-judge court was presented in an attack upon the textbook title of the Elementary and Secondary Education Act of 1965.

In *Brusca v. State Board of Education,* 405 U. S. 1050 (1972), it affirmed a decision (332 F. Supp. 275) holding that exclusion of parochial schools from tax-funding of education did not violate any constitutional rights of parents sending their children to such schools.

In *Franchise Tax Board v. United Americans,* — U. S. —, No. 73-1718, decided October 21, 1974, it affirmed a District Court decision invalidating a statute providing tax reductions for parents of parochial school pupils.

In *Luetkemeyer v. Kaufmann,* — U. S. —, No. 73-1612, decided October 21, 1974, it affirmed a decision upholding a Missouri law limiting free transportation to pupils attending public schools.

Finally, in *Marburger v. Public Funds for Public Schools,* — U. S. —, 94 S. Ct. 3163 (1974), it affirmed a District Court decision (358 F. Supp. 29) holding unconstitutional on its face a New Jersey statute providing auxiliary services, textbooks, instructional materials and instructional equipment to private and parochial schools. The New Jersey statute invalidated in *Marburger* is substantially identical with Acts 194 and 195; in some respects, there are minor differences but, we suggest, none rises to constitutional dimensions. We recognize that a *per curiam* affirmance does not have the same precedential force as an affirmance with opinion. The reason for that is that it is not certain that the Court affirmed on the ground on which the lower court based its decision. The history of *Marburger,* however, indicates that the Court considered the case and decided it within the same framework as did the District Court, namely, the principles set forth and applied in *Lemon v. Kurtzman* and *Earley v. DiCenso* and their progeny. See *Marburger v. Public Funds for Public Schools,* — U. S. —, 93 S. Ct. 3024 (1973).

Two decisions of this Court, both before 1971, upheld expenditures at the elementary and secondary school level: *Everson v. Board of Education,* 330 U. S. 1 (1947) (bus transportation), and *Allen* (textbooks). Both are relied upon by the District Court, but the key to the resolution of the present case is the following from this Court's opinion in *Sloan v. Lemon,* 93 S. Ct. at 2986-87 (1973):

> . . . Such benefits [as allowed in *Everson* and *Allen*] were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. . . . In *Lemon* we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support". . . . *Again today we decline to approach or overstep the "precipice" of establishment against which the Religion Clauses protect.* (Citations omitted. Emphasis added.)

The statutes challenged in this suit, we submit, constitute still another "further step" in seeking to grant assistance to church schools. Again the Court should "decline to approach or overstep the 'precipice' of establishment against which the Religion Clauses protect."

II.

Act 194: Auxiliary Services.

The opinion of the District Court (JS, p. 11a) states that we are dealing in this litigation "with four separate programs." We respectfully disagree. We suggest that Acts 194, 195 and 204 constitute a single package designed to recoup for the religious schools what was lost to them by virtue of *Lemon v. Kurtzman, supra,* and *Sloan v. Lemon, supra.* The New Jersey Legislature combined in a single statute what is contained in Acts 194 and 195. The District Court in *Marburger* considered the statute there as a whole and invalidated it as a whole. So, too, in the present case in determining the purpose and effect of Acts

194 and 195, they should be considered as a single legislative act. For convenience, however, we discuss each of the parts of the two statutes separately. We do this because we are confident that, whether considered separately or together, each of the programs violates the Establishment Clause.

For the reasons fully expounded in Judge Higginbotham's dissenting opinion and the District Court's opinion in *Marburger*, we submit that Act 194 cannot stand. The Pennsylvania Legislature has not avoided nor can it avoid both the Scylla of aid and the Charybdis of entanglement.

Act 194 is open-ended. It defines auxiliary services to include "such other secular, neutral, non-ideological services as are of benefit to nonpublic school children. . . ." The Regulations adopted by the State Board of Education to implement the Act interpret this to include instructional services for bringing pupils below grade to grade level.[3]

Every school, as part of its normal operations, provides instructional services to below grade level students to bring them up to grade level and to assist them to perform at the grade level for their age and potential. Indeed, there are very few schools in which every pupil is at or above grade level in every subject taught, and it is doubtful that any school fails to provide services to the pupils to bring them up to grade level in each subject. Whatever additional expense is involved is a normal part of the school's operating budget. By relieving the nonpublic schools of this part of their operating costs, the Commonwealth of Pennsylvania is subsidizing the normal operations of nonpublic schools, including those which have as

3. Regulation 1.11 reads: "*Services for the improvement of educationally disadvantaged* shall include but are not limited to those services necessary to assist a student to perform at the grade level for his age and potential." (JS, page 30a.)

their purpose the teaching, propagation and promotion of a particular religious faith, are an integral part of the religious mission of the sponsoring church, and have as a substantial or predominating purpose the inculcation of religious values.

Act 194 seeks to limit publicly financed services to such as are "secular, neutral, and non-ideological"; it could hardly do otherwise in view of the restrictions of the First Amendment. But how can the State make sure, as it must, that the subsidized teachers do not inculcate religion? It can only do so by "comprehensive, discriminating, and continuing state surveillance" which the Court held in *Lemon* is forbidden by the Establishment Clause (403 U. S. at 619). We can see no constitutional distinction between teaching "secular, neutral, and nonideological" subjects to grade level students in church schools and teaching them to students below grade level in the same schools. In *Lemon*, the Court held the former to be unconstitutional; we submit, the latter is equally unconstitutional.

Act 194 is fatally defective on two grounds. It subsidizes the teaching of secular subjects in church schools, which *Lemon* held cannot be constitutionally done. At the same time, it propels the State into partnership with the church—a junior partnership but a partnership nonetheless—in the operation of church schools. If there was anything the Establishment Clause was intended to accomplish it was to forbid such partnerships of Church and State, common throughout European history, from taking root on these shores. This is what the Court had in mind when, in *Walz v. Tax Commission*, 397 U. S. 664 (1970), it said (at 674):

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. • • •

In *Lemon*, the Court went out of its way to point out the holding in *Walz* "tended to confine rather than enlarge the area of permissible state involvement wih religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship" (403 U. S. at 614). The Court said further (at 615):

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. • • •

For that reason, the complaint in this case alleged that the Acts, both on their face and as administered, encompass as permissible beneficiaries schools which impose religious restrictions on admissions, require attendance of pupils at religious exercises, require obedience by students in the doctrines and dogmas of a particular faith, are an integral part of the religious mission of the church sponsoring them, have as a substantial purpose the inculcation of religious values, impose religious restrictions on faculty appointments, and impose religious restricions on what or how the faculty may teach.

These indicia of religiosity were culled from the various opinions in *Lemon*, *DiCenso* and *Tilton v. Richardson*, 403 U. S. 672 (1971), and indicate the "character and purposes" of institutions which the Court would hold ineligible under the *Walz* test. In *Tilton*, the plurality opinion deemed use of such a "profile" to be inappropriate because none of the defendant colleges fitted the profile and colleges

which did were held by the government to be ineligible to receive benefits (403 U. S. at 682).

The exact opposite is the case here. As we have pointed out (*supra*, p. 4), all parties concede that institutions fitting this description are eligible to receive benefits under the Act. It may well be that there may be few schools in Pennsylvania which fit the profile in every detail, but it is quite obvious that far less is necessary to establish unconstitutionality; indeed, we suggest, any one of them would be enough. Thus, Mr. Justice White, in his concurring-dissenting opinion in *Tilton-Lemon-DiCenso* stated that, if any school restricted entry on religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith, the legislation would to that extent be unconstitutional (403 U. S. at 671, footnote 2). Similarly, it is difficult to see how, in the light of *Epperson v. Arkansas*, 393 U. S. 97 (1968), government can finance schools which impose religious restrictions on what or how the faculty may teach.

It is immaterial that the secular educational services provided for in Act 194 are designated "auxiliary"; constitutionally, they are indistinguishable from other teaching services. As the District Court said in *Marburger:*

> The defendants argue that no surveillance would be required to enforce State limitations in the auxiliary program because the processes which would be involved in remedial reading or remedial arithmetic are clearly more peripheral to the possibility of religious indoctrination than the initial teaching of reading and arithmetic. Even though this argument is sound, to a degree, a teacher who teaches reading or remedial reading remains a teacher. A teacher's instruction may vary in content or emphasis and is not entirely predictable. A teacher is not a textbook, the contents of which remain constant, as the Court recognized in *Lemon*, stating:
>
> > We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. *Lemon, supra*, at 617.
>
> This being so, it would be necessary to continually review the content of a teacher's instruction in order to see that it adheres to the restrictions imposed by the statute, in that it be confined only to secular and non-ideological matter.
>
> Moreover, it is clear that the teachers providing such auxiliary services will be functioning within the confines and environment of a given religious institution where a religious atmosphere may be pervasive. Although the teachers of auxiliary services are not employed by a religious organization and are not directly subject to the direction and discipline of a religious authority, they will, nonetheless, be working in atmospheres dedicated to the rearing of children in a particular religious faith. Again it would seem that a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers. Furthermore, the arrangement may provoke some controversy, as noted in *Lemon*, between the auxiliary teachers and the religious authority over the precise meaning and extent of the legislative restraints. See *Lemon v. Kurtzman, supra*, at 619.

In *Walz*, the Court warned against "governmental grant programs [which] could encompass sustained and detailed administrative relationships for enforcement of statutory and administrative standards." For that reason, in *Lemon-DiCenso* it ruled unconstitutional the Pennsylvania and Rhode Island statutes financing secular teachings in church schools. In the present case, completely aside from the question of surveillance, we cannot see how publicly employed personnel can be assigned to render educational services in religious schools without involving both church and state in sustained administrative relationships. A religious school does not cease to be a religious school when a public school teacher walks in. It remains under the control and direction of the religious authorities and the public school teacher must work out his or her operational relations with them on a continuing and day-to-day basis.

It does not matter whether the auxiliary services teacher is initially engaged by the public or by the church school authorities. Nor does it matter whether the teacher is primarily accountable to the public or to the church school authorities. (In most cases, he or she will undoubtedly be working under the supervision of both.) The Establishment Clause, as we have noted, forbids a partnership between church and state no less than one of master and servant.

However viewed, we submit, Act 194 cannot stand under the First Amendment as written by the Constitutional fathers or as interpreted and applied by this Court.

III.

Act 195: Textbooks.

The District Court based its justification of the textbook provisions of Act 195 on *Allen*. Even Judge Higginbotham, though with great reluctance, went along. This, we

believe, was error; Act 195 goes beyond *Allen* and there was no more reason to extend that decision in the present case than in *Marburger*. We will expand on this point shortly; but at the present time we suggest that the time may well have arrived for the Court to re-examine and reconsider *Allen*.

The sole basis of *Allen* was *Everson;* but *Everson* itself, as the Court conceded, went to the very verge of the constitutionally permissible, and *Allen* went beyond that verge. It is of great significance that the author of the *Everson* opinion, Mr. Justice Black, vigorously dissented from the *Allen* opinion. In *Everson,* the Court said (330 U. S. at 15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis supplied.)

The New Jersey statute was upheld because the "state contributes no money to the schools" and "does not support them" (330 U. S. at 18).

In *McCollum v. Board of Education,* 333 U. S. 203 (1948), the Court held it unconstitutional to allow the use of public school premises for sectarian teachings. The Court repeated that, *"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion"* (Emphasis supplied; 333 U. S. at 210).

In *Zorach v. Clauson,* 343 U. S. 306 (1952), the Court upheld the constitutionality of a program of released time for religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, *because no expenditure of public funds or use of public buildings was involved.* The Court said (at 314): *"Government may not finance religious groups* nor undertake religious instructions *nor blend secular and sectarian education* * * *" (Emphasis supplied.)

In *McGowan v. Maryland,* 366 U. S. 420, 443 (1961), and *Torcaso v. Watkins,* 367 U. S. 488, 493 (1961), the Court again, in each case, repeated the statement, made in the *Everson* and *McCollum* cases, that *"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."* (Emphasis supplied.)

In *Engel v. Vitale, supra,* the Court, in holding unconstitutional the practice of prayer recitation in the public schools, which had been prevalent almost since the founding of the public schools, stated that when "the power, prestige *and financial support* of government is placed behind a particular religious belief," the Establishment Clause of the

First Amendment is violated. (Emphasis supplied.) The Court (370 U. S. at 436) quoted from Madison's *Memorial and Remonstrance* that "* * * the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

In *Abington School District v. Schempp, supra,* the Court invalidated devotional Bible reading and prayer recitation in the public schools, and while it set forth a test (purpose and effect) somewhat different in wording from that in *Everson* it cited *Everson* in support of the test and of its decision.

In sum, nothing in the Court's decisions before *Allen* required or even justified the conclusion reached in *Allen.* The post-*Allen* decisions (which we have already reviewed, *supra,* pp. 11-14) are even clearer. Significant as is the dissent in *Allen* by the author of the *Everson* opinion, even more so is the fact that the author of the *Allen* opinion dissented from every decision in the post-*Allen* era. He did so on the ground that these decisions were inconsistent with *Allen,* and we suggest that he was correct in this. We suggest that *Allen* cannot be reconciled with the letter or spirit of all the judicial history that preceded it, and even less so with that which followed it. In short, we think the time has arrived for the Court to reconsider *Allen,* and on reconsideration to overrule it.

Should, however, the Court not be prepared at the present time to do this, we submit that it should nevertheless hold the textbook provisions of Act 195 to be unconstitutional. These go substantially beyond *Allen* and the New York statute which it upheld and can be justified only if the Court goes substantially beyond the verge reached in *Allen.*

As we have noted, Act 195 (Section 922-A(c)) provides that t[illegible]ooks shall be furnished "subject to such rules and regul[illegible]ons as may be prescribed by the Secretary of Education." Rules and regulations (Guidelines for the Administration of Acts 194 and 195) having been prescribed, they are deemed part of the statute and must be scrutinized by the Court in determining the facial constitutionality of the statute. Such scrutiny, we submit, will show that there is present such administrative entanglement (in addition, of course, to political entanglement and religious divisiveness) as requires invalidation under the principles announced in *Lemon-DiCenso* and subsequent cases. Specifically, we point out the following:

> 1. Although the Act provides that the textbooks shall be loaned "upon individual request" of children, the Guidelines make no provision for individual requests to the Department of Education but rather require that the nonpublic schools make the requests. Guidelines 4.3.

2. The nonpublic school is granted a five percent transportation allowance. *Ibid.* 4.4.

3. The textbooks are not delivered to the children but to the schools. *Ibid.* 4.7.

4. The Department of Education is responsible for fiscal control, fund accounting and maintaining records for the acquisition of the textbooks. *Ibid.* 4.7. Obviously, this requires the surveillance and fiscal control of the operations of parochial schools which this Court held constitutionally impermissible in *Walz, Lemon, DiCenso* and *Nyquist-Sloan-Levitt.*

5. Each nonpublic school is responsible for any expenditures in excess of its allocation. *Ibid.* 4.9.

This, too, obviously requires surveillance, auditing and fiscal control.

6. The nonpublic schools are required to maintain an inventory of the textbooks. *Ibid.* 4.10a.

7. "It is presumed that textbooks *on loan to nonpublic schools* [sic] after a period of time will be lost, missing, obsolete or worn out. This information should be communicated [presumably by the school rather than the individual children] to the Department of Education." *Ibid.* 4.11.

8. The nonpublic school is responsible for maintaining on file certificates of requests for all textbooks loaned under the Act. The file must be open to inspection by the appropriate public authority. *Ibid.* 4.13. Here, again, we have an instance of that "comprehensive, discriminating, continuing state surveillance" required to insure that the First Amendment's restrictions will be obeyed. *Lemon-DiCenso,* 403 U. S. at 619.

In sum, even as to textbooks, Act 195 involves a primary purpose to advance religion, administrative entanglement between church and state, and state surveillance of the operations of religious schools, all in violation of the Establishment Clause as interpreted by this Court.

IV.

Act 195: Instructional Materials.

We have set forth (*supra,* pp. 5-6) the statutory definition of instructional materials. This too is open ended: "The term includes such other secular, neutral, nonideological materials as are of benefit to the nonpublic

school children and are presently or hereafter provided public school children of the Commonwealth." These clearly go beyond the verge of *Allen* and the New York statute it upheld. Clearly, the principles of advancement of religion, administrative entanglement, and political and religious divisiveness (the latter stated in *Lemon* and amplified in Part III of *Nyquist* and footnote 7 in *Sloan*), are all applicable to the provisions of Act 195. Moreover, and most important, the Pennsylvania Legislature itself made a distinction between textbooks and everything else. Section 922-A(c) in providing for "loan of textbooks" requires that loans be made to children "upon individual request." Subdivision (c), on the other hand, provides that the loans of other materials, supplies and equipment be made to the nonpublic schools on *their* request. In *Allen*, the Court stressed that under the statute "no funds or books are furnished the parochial schools" (392 U. S. at 243-44), and found it "in conformity with the Constitution, for the books are furnished for the use of individual students at their request." *Ibid.*, footnote 6. This is not the case under Act 195.

The crux of the matter is that Act 195 encompasses schools whose purpose it is to advance religion. In order to achieve this purpose, the schools must provide instruction in secular subjects. Part of the budget of the schools is the expenditure of funds for instructional materials. When the State supplies these schools with the materials, the effect thereof is to advance religion to the same extent as if it provided them with funds to purchase the materials or reimbursed parents for the tuition paid by them to the schools to enable the latter to purchase the materials. In short, it constitutes a State subsidy for the operations of religious schools. This, we submit, the Establishment Clause forbids.

Moreover, unlike textbooks, much of the instructional materials referred to in Act 195 can easily be used for religious purposes. For example, the record in *DiCenso* indicates that the teachers in the Rhode Island parochial schools are advised "to stimulate interest in religious vocations and missionary work" (403 U. S. at 618). There is no reason to believe that the same is not true in parochial schools outside of Rhode Island, including those of Pennsylvania, particularly at the high school level and particularly today when there is a growing shortage and hence a greater need for priests and sisters. Maps, charts and globes, instructional materials specified in Act 195, can easily be used in connection with a recruitment campaign for religious vocations and missionary work. Unlike textbooks, these materials are not self-contained and self-explanatory but are designed to be used in connection with and aid of oral exposition. The only way to prevent their use for religious purposes is through that continuing state surveillance of church school operations which the Establishment Clause forbids.

It is appropriate at this point to quote further from *DiCenso*. The court there said (ibid.):

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some

to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion * * *.

What the Court said in *DiCenso* is no less applicable here. Pennsylvania, like Rhode Island, cannot "provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts." The State must be certain that subsidized teachers do not inculcate religion or use state-provided instructional materials for that purpose. The State can be certain of this only by continuing surveillance, and this the Religion Clauses forbid.

V.

Act 195: Instructional Equipment.

The District Court determined that, in respect to instructional equipment, Act 195 as written went too far. (The defendants, by not cross-appealing, apparently acquiesced in this determination.) It sought to save this

part of the statute by distinguishing between permissible and non-permissible instructional equipment and allowed such equipment which "from its nature cannot readily be diverted to religious purposes, and is particularly designed or designated for such secular purposes as provided in said statute and its duly promulgated guidelines for the administration of such statute."

We have set forth as an appendix hereto (*infra*, pp. 33-34) the text of the revised guidelines issued by the Commonwealth in compliance with the District Court's decision. An examination of these guidelines requires a conclusion that the District Court's effort to salvage some part of the instructional equipment provisions of Act 195 must be adjudged futile.

In *Levitt v. Committee for Public Education and Religious Liberty, supra*, the Court held unconstitutional a statute providing public funds for the purchase of such secular and nonideological materials as heating fuel and electricity for use in church schools. If it advances religion to appropriate public funds for this purpose, we fail to see how it does not advance religion to provide funds for the purchase of the type of instructional equipment permitted by the District Court, and if this is so it is no less an advancement of religion to provide the equipment itself. The point is that the purpose of both the New York statute invalidated in *Levitt* and Act 195 (as well, of course, of 194) is to help finance the ordinary, everyday expenses of maintaining and operating a church school. It need hardly be added that this may not be done consistently with the Religion Clauses of the First Amendment.

There is another aspect of the instructional equipment provisions of Act 195 which manifests their unconstitutionality. An examination of the revised guidelines shows that with moderate resourcefulness much of the

permissible equipment can be used for religious purposes or be converted for such use. For example, the guidelines allow "industrial arts equipment;" but such equipment can be used to construct crosses, crucifixes and altars, and it is a fair guess that in many church schools they are used, *inter alia*, for exactly those purposes. Similarly, storage cabinets and carts, permitted by the guidelines, can be used to store and move religious materials, and here, too, we are certain that they are used for these purposes. The only way to safeguard against this, and the decisions of this Court have made it clear that the First Amendment requires such safeguards, is that continuing surveillance which the Amendment itself forbids.

CONCLUSION.

If, as we urge, the Court rules Acts 194 and 195 unconstitutional in their entirety, it will close up another loophole sought to be placed by ingenious legislators and lawyers for church schools in the wall separating public funds from religion. This, however, is exactly what the generation that wrote the Religion Clauses into the First Amendment intended, and what this Court's decisions show that it has intended and still intends. Certainly, the Court has not intended that windows shall be opened where the Constitutional fathers sought firmly to lock the door. If the result seems harsh, we point out that we do not challenge the right of parochial school children to obtain the auxiliary services provided by the statutes or the constitutional authority of the Commonwealth to provide those services to them. We challenge only the power to supply the services on church-owned and church-controlled premises as part of the program of parochial school education under church sponsorship. We recognize that requiring the children to come to publicly controlled

neutral premises to receive publicly administered services may be less convenient than the form of administration authorized by the statutes. But, this is no less true with respect to any of the numerous forms of aid that the Court has ruled unconstitutional. In these cases, the Court has judged that the First Amendment values of the mutual independence of church and state and the continued integrity of both require that a choice be made between publicly financed services under public auspices and privately financed services under church auspices.

For the reasons stated, the decision of the District Court should be reversed and Acts 194 and 195 be declared unconstitutional in their entirety.

Respectfully submitted,

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November, 1974.

APPENDIX A.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION
HARRISBURG, PENNSYLVANIA

Revisions to the Guidelines for the Administration of Acts 194 and 195 (Session of 1972, the General Assembly).

Section 1.13 of the Guidelines for the administration of Acts 194 and 195 is hereby amended to read:

"1.13 Instructional Equipment

A. Instructional Equipment shall mean instructional equipment, as hereinafter set forth, which from its nature cannot readily be diverted to religious purposes *and* is particularly designed or designated for secular educational purposes:

1. science and science laboratory equipment (including micro projectors, which are projectors used to magnify microscope slides);

2. mathematics equipment, including equipment, models and tools used for counting, computing, diagraming and measuring;

3. industrial arts equipment (except any such equipment which may be used in the preparation of printed, reproduced or copied materials);

4. physical education equipment;

5. home economics equipment, such as stoves, refrigerators, sewing machines and utility-type home economics equipment;

6. driver education equipment;

7 Tachistoscopic devices (reading pacers and devic s used to improve the students' reading ability), teaching and reading machines or devices which by their very nature are only capable of accepting commercially prepared secular materials which are specially designed for the particular machine or device;

8. televisions and radios which receive only public and commercial communication (this specifically excludes video tape recording equipment);

9. storage cabinets and carts if furnished as a recommended accessory to a permissible item under this guideline.

B. The term 'instructional equipment' does Not include projection equipment, duplicating equipment, recording equipment, broadcasting equipment and audio visual production equipment, unless specifically set forth above. The term does not include fixtures annexed to and forming a part of the real estate."

Approved—April 10, 1974.

HERBERT K. SALICK
for JOHN C. PITTENGER,
Secretary of Education.